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No. 83-166.

In the

Supreme Court of the United States.

OCTOBER TERM, 1983.

ROBERT ANGELO GUIPPONE AND
ANTHONY MICHAEL PORCELLI,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Reply to the Brief of the United States in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MARTIN G. WEINBERG,
LILLIAN A. WILMORE,
OTERI, WEINBERG & LAWSON,
75 Blossom Court,
Boston, Massachusetts 02114.
(617) 227-3700

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Petitioners Robert Guippone and Anthony Porcelli hereby respectfully make their reply to the brief of the United States in opposition to their petition for writ of certiorari.

I. The Government's Brief in Opposition Concedes that the Basic Facts as to the Denial of Access to the Original Tapes for Independent Analysis are True as Pleaded by the Petitioners.

The government's brief in opposition (hereinafter "OB.") seeks to characterize the issues raised by petitioners as "purely factual" and to support that contention by presenting this Honorable Court with a plethora of factual assertions not pertinent to the legal questions presented by petitioners. The only factual matter of significance to the legal questions raised is whether the petitioners were denied access to the original recordings of their conversations which were used to convict them at trial. In essence, the government concedes that access was denied and frames the question as to whether such denial was "improper." It does not, however, present the Court with legal argument on the "propriety," but rather with a series of rationalizations and excuses for the obvious injustice.

It is significant that the government does *not* argue that the facts as found by the Appeals Court are correct. It states, rather, that "neither the court nor the parties explored the issue thoroughly" (OB. 10 n.17). Nor does it address the lack of a remedy for such erroneous fact-finding if this Honorable Court does not act. See Petition, Statement of the Case, Part C and Reasons for Granting the Writ, Part II. The reason this vital issue was ignored, argues the government, is that the defendants raised so many issues. *Id.* Individual rights do not and should not hinge on the multiplicity of issues in a given case. Further, the government begs its confusion and misunderstanding, *i.e.*, "it *appears* that the government *believed* petitioners were seeking *custody* of the original tapes." *Id.* (emphasis added). That there is *no basis* in the record for such belief is plain. (See appendix to petition for rehearing in the Second Circuit Court of Appeals generally, especially Exhibit I

at 4, quoted in part in petition for writ of certiorari at 12.) The strongest record reference which the government can find in support of its alleged "belief" is the affidavit of petitioners' electronics expert, in which the expert affirms that: "I wish to emphasize that the integrity of the recordings and equipment can be safeguarded since the aforesaid examination may be made by a government designated expert in my presence." Appendix on Appeal (hereinafter "AA.") at 395.

II. The Government Erroneously Argues for the First Time that Petitioners Seek a General Rule that Defense Access to Copies of Electronics Surveillance Tapes is Insufficient: Petitioners Argue that Access to the Originals of Electronic Surveillance Tapes is Required when a Colorable Claim is Raised.

For the first time, the government implies that petitioners seek to argue that defense access to copies of electronic surveillance tapes would *generally* be insufficient (OB. 9 n.15). Petitioners have not, and do not raise such a claim. The questions raised herein center around the *specific* situation where defendants raise a more than colorable claim, *the strongest claim they can possibly raise without expert analysis of the original tapes*, and where the only access for analysis allowed is to copies of the tapes. Mere listening is not analysis and is a completely inadequate method of testing for authenticity and purity. The definition of a "colorable" claim and the allocation and nature of the burden of proof in such circumstances are legal issues fully capable of resolution by this Court and respectfully presented to it by petitioners. There must be clarification of the ground rules where a defendant claims and makes a showing of impurity or of tampering with electronic surveillances tapes.

III. The Government Argues for the First Time that There is No Conflict in the Circuits Regarding Defense Access to Such Original Tapes Because Tapes are Not Like Other Physical Evidence, where the Circuit Courts are Divided on the Standards for Access for Independent Analysis.

Also for the first time, the government argues that there is no conflict in the circuits as to the petitioners' right of access to such evidence, because electronic surveillance tapes are not like other physical evidence (OB. 9). Yet the government has nothing to say as to why electronic surveillance tapes should be treated differently than are seized narcotics, a murder weapon, or a bloodstain, especially where the evidence is "critical and subject to varying expert opinion." *Barnard* v. *Henderson*, 514 F.2d 744, 746 (5th Cir. 1975). All physical evidence is inherently fragile, but *access* for testing (not custody) cannot be denied in fairness where a colorable claim is raised. The trial judge was clear as to the terms and conditions being sought by the defendants. His denial rested on his view that tampering with tapes is a crude "cut and splice" process and that the petitioners had not carried the heavy burden he placed on them to prove that an agent intentionally and knowingly took "the scissors" to these tapes, without access to the original tapes for analysis (OB. 7 n.10 and OB. 11).

IV. Neither the Minimization Requirement of 18 U.S.C. § 2518 (5) nor Momentary Delay in Turning on the Recording Equipment Explains the Conceded Omissions From these Tapes.

The government flatly concedes that there were omissions in the tapes (OB. 11 n.19). It notes that the trial court suggested that "the omissions could have resulted from minimization."

Id. Petitioners urge this Honorable Court that pursuant to 18 U.S.C. § 2518(5) there would have been no reason for the agents to minimize the petitioners' conversations about gambling. Conversations about crimes other than the one being investigated may trigger an amendment to the warrant. Further, minimization occurs when the agent listens to the conversation for a brief period of time and then makes a determination as to whether it is pertinent. Minimization would not result in omissions from the *beginning* of conversations. See affidavit of petitioners (AA. 398-399), claiming omissions from the beginning as well as throughout conversations.

In its awareness that minimization could not lead to dropping the beginning of a conversation, the government argues that the omissions "could also have been due to the failure of the agents to turn on the intercepting equipment as soon as a petitioner entered the apartment, if the agents watching from across the street miscalculated the time used to travel from the entrance hall to the apartment" (OB. 11 n.19). Such failure would certainly not result in the loss of more than a few seconds of conversation. It does not explain omissions from conversations in mid-stream, nor does it account for the specific omissions claimed by the petitioners, *i.e.*, omissions that caused the content and substance of their conversations to become distorted. United States Code, Title 18, § 2518(8) (a) condemns the practice of editing conversations to the detriment of the party and of having his statements taken out of context. See Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies, 26 Stan. L. Rev. 1411, 1416-1417 (1974); Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories, 61 Corn. L. Rev. 92, 105-106, 121-122 (1975).*

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* See American Bar Association Standards, Electronic Surveillance § 5.13 (Authenticity):

> Electronic surveillance techniques employed by law enforcement officers for the recording of communications uttered in private with-

Also see *United States* v. *Bynum*, 360 F. Supp. 400, 408-409 (S.D. N.Y. 1973), *aff'd*, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974), *conformed to*, 386 F. Supp. 449, *aff'd*, 513 F.2d 533, *cert. denied*, 423 U.S. 952 (1975) (§ 2518(8) "encourages the recording of calls — with specific procedures for sealing and storing the tapes produced — for the protection of the individuals whose conversations are subject to interception and recording and for guarding against editing and later claims of distortion of segments of the tapes," 360 F. Supp. at 409); and *United States* v. *Manfredi*, 488 F.2d 588, 590 n.9 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Leta*, 332 F. Supp. 1357, 1360 (M.D. Pa. 1971); and *United States* v. *Focarile*, 340 F. Supp. 1033, 1048 (D. Md.), *aff'd sub nom. United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974). Minimization is not a license to destroy or conceal exculpatory evidence.

V. The Petitioners' Motion for Independent Analysis was Timely and is Fully Developed on the Record.

For the first time in the instant case the government attempts to raise the spectre of an "eleventh hour" demand for access to the original tapes (OB. 10). Petitioners filed a timely pre-trial notice of motion for independent analysis of the original tapes, which was denied by Judge Owen on December 4, 1981 by endorsement on the first affidavit of petitioners' electronics expert. A second affidavit of the expert was filed on December 9, 1981. The judge denied the petitioners' motion for independent analysis on January 7, 1982, requesting that the parties to the intercepted conversations file affidavits

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out the consent of the parties should be so employed that a *complete, accurate and intelligible* record of the communication will be obtained. (Emphasis added.)

in support of their motion. The petitioners filed affidavits on January 13, 1982. Independent analysis of the original tapes was fully denied (AA. 398, 964, 1191, 1251). Jury selection commenced February 17, 1982. Motions for independent analysis were renewed at trial and denied (AA. 964, 1251, 1191). In its brief on appeal the government made no challenge to the timeliness of the motion for independent analysis.

The government appends to its brief in opposition a "transcript" of an intercepted conversation between Willard Williams and the petitioners. A fair and non-partisan reading of this admitted "excerpt" shows Williams attempting to solicit Porcelli to get cocaine for *him*, *i.e.*, for his personal use; Porcelli stating relievedly that he is cured from the use of cocaine, but indicating that he knows "a guy" who had cocaine; and Guippone trying to put Williams off and get him to stop aggravating Porcelli about getting cocaine for him. This conversation is an insufficient basis for a conviction on a count of possession or distribution of a large quantity of cocaine on that same day, March 6. The record shows that no cocaine was delivered to Williams by either petitioner on that day (AA. 1405, 1048). Money changed hands, but it is not clear what the money was for. This scant "transcript" is unintelligible ("UI") in twenty-one different places.

Petitioners do not argue to the Court that the conversation of March 6 said nothing about cocaine. Rather, they have persistently pressed their defense that their relationship and dealings with Williams were about gambling and not drugs and that they were not guilty of the offenses charged. The government attempts to parlay this snippet of conversation into a massive drug-dealing conspiracy which involves the petitioners. What is missing, omitted, and deleted is the heart of the matter: the petitioners' true relationship with Williams and their innocence of the offenses charged.

The legal questions raised by petitioners are clear, narrow, developed on an extensive record and fully capable of resolution by this Court. The increasing use of electronic surveillance as an investigatory tool compels a conclusion that the issues raised will recur. The government's brief in opposition has resolved any questions as to the basic facts underlying the claims raised by petitioners. The guidance of this Honorable Court is needed.

Respectfully submitted,

MARTIN G. WEINBERG,
LILLIAN A. WILMORE,
OTERI, WEINBERG & LAWSON,
75 Blossom Court,
Boston, Massachusetts 02114.
(617) 227-3700